19

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 632.

STATE OF MISSOURI UPON THE INFORMATION OF ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI, A MUNICIPAL CORPORATION, PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A DELAWARE CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

A. Z. PATTERSON,
DEWITT C. CHASTAIN,
Attorneys for Respondent.

INDEX

Table of Cases

TEXT

STATUTES

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 632.

STATE OF MISSOURI UPON THE INFORMATION OF ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI, A MUNICIPAL CORPORATION, PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A DELAWARE CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The Supreme Court of Missouri, *en banc*, without dissent, held valid a perpetual franchise to operate an electric light and power plant in the City of Trenton. It held that the franchise granted by the City of Trenton to C. D. Jones on July 22, 1886, which had been duly as-

signed to the respondent was, under the decisions of the State of Missouri, valid, and that no forfeiture thereof had occurred. The franchise was for both a gas plant and electric plant; the gas plant was constructed in 1886, but operation under the electric branch of the franchise was not begun until 1897, but from 1897 continuously until the present the respondent and its predecessors have operated the electric plant, and this without any question on the part of the State or City of Trenton until the present ouster suit was brought in 1938 following the erection of a municipal plant. For more than forty years no question was raised by the City of Trenton or by the State as to the validity of the electric franchise or the right to operate thereunder. The Supreme Court, following prior decisions and without reversing any prior decision or departing in any way from them, upheld the validity and present effectiveness of the franchise.

It is the law in Missouri that after a *quo warranto* proceeding is brought by the Attorney General the relator is the real party in interest and is in absolute control of the proceeding. It is provided by Sec. 1782, R. S. Mo., 1939, that if any person usurp any franchise the Attorney General shall proceed in *quo warranto* at the relation of any person desiring to prosecute the same, and that when the information has been filed, the same shall not be dismissed without the consent of the person named as relator, but such relator shall have the right to prosecute the same to final judgment. This, the Missouri courts hold, makes the relator the real party in interest, so this action is one by the City of Trenton although in the name of the Attorney General.

The petition for certiorari to this Court sets up three claims as a basis for the issuance of a writ.

1. That the judgment of the Missouri Supreme Court failed to give full faith and credit to the judgment of the United States District Court in another action.

2. That the judgment sustaining the franchise and denying the ouster impairs the obligation of petitioner's contract in violation of Section 10 of Article I of the Constitution, and

3. That such judgment deprived petitioner of property without due process of law contrary to the provisions of the V and XIV Amendments to the Constitution.

To understand the claim of *res judicata* a fuller statement of facts is necessary. In 1937 respondent filed a bill in equity in the United States District Court of Kansas City (R. 47) in which it sought to enjoin the City of Trenton, certain contractors, and purchasers of the bonds of the City of Trenton from the construction of a municipal electric plant in the city on the ground that such a plant would constitute unlawful competition. As a basis of its interest the bill alleged that the respondent was the holder of a franchise, describing the Jones franchise. The validity of the franchise was involved only in connection with the right of the plaintiff in the action to maintain its suit. The District Judge granted a temporary injunction, but held on final hearing that the plaintiff (respondent herein) did not have a right to maintain the suit because the Jones franchise, under which it claimed, had not been ratified by a vote of the people (R. 140). The only conclusion of law which the District Judge made was (R. 143) that the plaintiff had no such property interest as entitled it to relief in equity prayed by it in the proceeding, that there was no jurisdiction in equity to grant the relief prayed by the plaintiff, and the decree (R. 144) dismissed the plaintiff's bill. There was no judgment on

the merits but only a dismissal for lack of interest sufficient to allow the plaintiff therein to maintain the suit. The case was duly appealed to the Circuit Court of Appeals and an opinion in the case was written by Judge Sanborn (R. 158). In the opinion, after a statement of the facts, Judge Sanborn considered a motion to dismiss the appeal filed by the city on the ground that the case, because the plant had been erected, had become moot. He pointed out respondent's objection that such a dismissal might be regarded as an adjudication of the franchise question and declined to dismiss the case as moot, and considered the case on its merits. The opinion outlines the contentions of the appellant (respondent here) that the contracts were void because of the failure to comply with the law in advertising for bids, and (2) that appellant is the holder of a non-exclusive franchise and had the right to maintain the suit; and after citing authority, the opinion held that whether the appellant had a franchise which it claimed or not, it had an interest sufficient to enable it to maintain the action. The opinion did not discuss the validity of the Jones franchise at all, but proceeds to hold that the irregularities in advertising for bids were not prejudicial, and further held that at the time the suit was commenced it was too late for the appellant, either as a tax payer or as a holder of franchise, to question the lawfulness of the contract, and then the opinion closes with the statement: "We think the decree appealed from was right for the reasons stated, and therefore affirmed."

The reasons referred to were the reasons given in the opinion by the Court of Appeals and not those given by the District Judge. The Court of Appeals overruled the District Judge in his holding that the plaintiff therein did not have sufficient interest to maintain the suit, and thereby rendered unnecessary any decision as to the valid-

ity of the Jones franchise. Under the opinion of the Court of Appeals the Jones franchise was not an issue in the case. The Court of Appeals overruled the trial court in its decision that there had been failure to comply with state statutes as to notice, and held that laches prevented the maintaining of the suit.

No claim was asserted before the Supreme Court by the relator with respect to infringement of its rights under the contract clause or the due process clause of the Constitution, but the relator in its motion for a rehearing (R. 1151) sets up in Paragraph 10 that the decision of the Supreme Court in granting to respondent a perpetual franchise has unlawfully deprived the relator of its right to contract, and by determining that such franchise exists, the obligation of a contract has been impaired in violation of Section 10 of Article I of the Constitution.

In Paragraph 12 of said motion (R. 1151) the relator claims to have been deprived of property without due process of law in that the Supreme Court, without consideration of the matter and without lawful authority, had determined that the construction and operation of a gas plant under a purported franchise, constitute a user to generate and distribute electric energy.

The opinion of the Missouri Supreme Court (R. 1128) sets out the Jones franchise in full, discusses the issue of *res judicata* claimed to exist by reason of the Federal District Court opinion, held that the Circuit Court of Appeals considered the case *de novo* on the evidence before the District Court, and that the affirmance by the Circuit Court of Appeals was not a general affirmance nor an affirmance of the opinion below, but was an affirmance for the reasons which it had stated, and that the validity of the Jones franchise was not one of the reasons and consequently the question was not *res judicata*. The opinion

then considers the power of the town council of Trenton in 1886 to grant the franchise, and cites many decisions of not only Missouri courts but of other courts, including this court, and determines that the City of Trenton had the power to grant a perpetual non-exclusive franchise. The opinion then holds that the failure to exercise the right to build an electric plant from 1886, when the gas plant was erected, to 1897 when plaintiff's predecessors in title began the operation of an electric plant, did not operate as an automatic forfeiture of the right under the franchise, and cites many Missouri cases sustaining its construction that there was no forfeiture, and pointing out that the city had never undertaken to declare a forfeiture of the Jones electric franchise.

The petitioner in his brief quotes at great length from the opinion of the special commissioner appointed by the Supreme Court to hear and report the case. It will be found that such report (R. 1047), while binding on no one, expressly ruled the issue of *res judicata* raised by relator against it (R. 1055), and expressly held that the town of Trenton had the power to grant the franchise (R. 1070), and that the franchise was not required to be approved by public vote (R. 1076). Every issue was decided by the commissioner in respondent's favor except the question of automatic forfeiture. The Supreme Court declined to follow the commissioner on this point, and pointed out that he had fallen into an error of fact, and the portions of the opinion of the special commissioner which the relator quotes extensively at pages 48 to 52 of his petition herein were not adopted by the Supreme Court but were expressly disapproved by it.

The conclusion of the District Court that the Jones franchise was invalid was based upon the conclusion that Secs. 951 and 952, R. S. Mo., 1879, required such franchise

to be approved by a vote of the people. The decision of the District Court was concededly wrong. The Supreme Court in its opinion stated (R. 141) that it was not urged that popular approval of the Jones franchise was required at the time it was granted, and stated that no such contention could have been made in view of the Supreme Court rulings in *State ex inf. Chaney* v. *West Missouri Power Co.*, 313 Mo. 283, 281 S. W. 709, and in the Springfield Water Company case (*State ex rel. City of Springfield* v. *Springfield Water Co.*, 345 Mo. 6, 131 S. W. 2d 525). In addition to these cases there were two other decisions of the Missouri Supreme Court holding that a franchise granted under Secs. 951 and 952, R. S. Mo., 1879, did not require a ratification at the hands of the voters, and these decisions (*Holland Realty & Power Co.* v. *City of St. Louis*, 282 Mo. 180, 221 S. W. 51, and *State ex inf.* v. *Light & Power Co.*, 246 Mo. 653, 152 S. W. 76) were before the Court of Appeals in connection with respondent's appeal in the injunction case.

The holding in the District Court's opinion that the Jones franchise was invalid, and which the relator seeks to invoke as *res judicata*, is conceded to be erroneous in point of law under expressed decisions of the Missouri Supreme Court, and the opinion of the Circuit Court of Appeals expressly shows that it did not desire its opinion to stand as an adjudication on the franchise question (R. 160).

SUMMARY OF ARGUMENT AND SUPPORTING AUTHORITIES.

A.

The decision of Judge Otis in the District Court that the Jones franchise was invalid because of failure to be approved by a vote of the people was not res judicata.

1. The appeal in equity resulted in a de novo hearing of the cause.

Dodge v. *Knowles*, 114 U. S. 430.

Kendall v. *Ewert*, 259 U. S. 139, 42 S. Ct. 444.

Aro Equipment Corp. v. *Herring-Wissler Co.*, (8 C. C. A.) 84 F. 2d 619.

Union Central Life Ins. Co. v. *Imsland*, (8 C. C. A.) 91 F. 2d 365.

2. The judgment of the District Court was not on the merits and is not res judicata except as to such issues as were affirmed by the Court of Appeals, and the invalidity of the Jones franchise was not affirmed.

Henderson v. *U. S. Radiator Corp.*, (10 C. C. A.) 78 F. 2d 674.

Cromwell v. *County of Sac*, 94 U. S. 351.

United Shoe Machinery Corp. v. *U. S.*, 258 U. S. 451, 42 S. Ct. 363.

Baltimore Steamship Co. v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600.

Harriman v. *Northern Securities Co.*, 197 U. S. 244, 25 S. Ct. 493.

North Carolina R. Co. v. *Story*, 268 U. S. 288, 45 S. Ct. 531.

Restatement of the Law, Judgments, Section 69, page 316.

B.

The contract clause of the Constitution (Section 10, Article I) may not be invoked by the relator city.

McCoy v. *Union Elevated R. Co.*, 247 U. S. 354, 38 S. Ct. 504.

Columbia Ry., Gas & Elec. Co. v. *State of So. Carolina*, 261 U. S. 236, 43 S. Ct. 306.

City of Trenton v. *State of New Jersey*, 262 U. S. 182, 43 S. Ct. 534.

City of Newark v. *State of New Jersey*, 262 U. S. 192, 43 S. Ct. 539.

City of New Orleans v. *New Orleans Water Works Co.*, 142 U. S. 79, 12 S. Ct. 142.

C.

The power of a state and its agencies over its municipal corporations is not subject to any restraint under the 14th Amendment of the Constitution.

Cases under B, *supra*.

City of Pawhuska v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394, 39 S. Ct. 526.

Risty v. *C., R. I. & P. Ry. Co.*, 270 U. S. 378, 46 S. Ct. 236.

Tenn. Electric Power Co. v. *Tenn. Valley A.*, 306 U. S. 118, 59 S. Ct. 366.

Cranford Co. v. *City of New York*, (C. C. A. 2) 38 F. 2d 52.

East Hartford v. *Hartford Bridge Co.*, 10 How. 511, 18 U. S. 483.

D.

The decision of the Missouri Supreme Court as to the validity of the Jones franchise is binding.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

E.

This court will accept the interpretation of the laws of Missouri relating to the Jones franchise made by Missouri courts.

Madden v. *Com. of Ky.*, 309 U. S. 83, 60 S. Ct. 406.

Milk Wagon Drivers Union v. *Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552.

ARGUMENT.

This Court is authorized by Section 344 (b), Title 28, United States Code, to review the final judgment of the highest court of a State wherein a title, right, privilege or immunity is set up or claimed under the Constitution, and it may review the judgment of the Supreme Court of Missouri if it has failed to give full faith and credit to the judicial proceedings of a court of the United States as required by Section 1 of Article IV of the Constitution. The opinion of the Missouri Supreme Court has not violated that provision. The opinion itself is the best defense against the charge because it has carefully considered the claim of the relator that the decision of the District Court in the prior action was *res judicata*.

It will be more convenient to refer to the published reports than to the transcript to consider the opinions of the District Court and of the Circuit Court of Appeals. As stated, the relator brought an action against the City of Trenton and the contractors to enjoin the construction of an electric plant, and a temporary restraining order was issued. The opinion of District Judge Otis granting the temporary injunction is reported under the style of *Missouri Public Service Corporation* v. *Fairbanks-Morse Company et al.*, 19 F. Supp. 38, in which opinion Judge Otis found that there had not been compliance with the state statute with respect to adverising for bids for the construction of the plant, and assuming that the plaintiff (respondent herein) had a franchise, that it was entitled to a temporary injunction. On final hearing, the opinion being reported in 19 F. Supp. 45, the District Court adopts the findings of fact which are set out in the opinion just

cited, and then considers the question of whether or not the plaintiff has a franchise, and held (l. c. 49) that since the franchise was not submitted to the people for ratification, it was void, and the Court entered formally a conclusion of law that the plaintiff had no such property interest as entitled it to relief in equity, that there was no jurisdiction in equity to grant the relief, and on such conclusion of law the Court dismissed the plaintiff's bill. Thus it will be seen that the District Court did not decide the case on the merits but only on the question of the right of the plaintiff to maintain the suit. As stated, the Court held, in issuing a temporary injunction, that the contracts had not been properly let, and except for the finding of the invalidity of the franchise, the plaintiff would have obtained a decree so that it is clear that the case was not decided on the merits. The case was appealed and the opinion on appeal is reported in 95 F. 2d. p. 1.

Pending the appeal the City of Trenton had completed the erection of its plant and filed a motion in the Circuit Court of Appeals to dismiss the appeal because the case had become moot. The Court of Appeals, pointing out respondent's objection to such dismissal, that such an order might amount to an adjudication as to the validity of the franchise, expressly declined to consider the case as moot. This certainly shows that the Court of Appeals did not intend to adopt the ruling of the District Court on the question. The Appellate Court did not discuss the validity of the franchise, but said:

> "We are of the opinion that the appellant, whether it had the franchise which it claims or not, had an interest sufficient to enable it to maintain this suit insofar as it sought to enjoin the threatened competition which it claimed would be unlawful."

This holding by the Court of Appeals certainly set aside the holding of the District Court that the plaintiff could not maintain the suit because its franchise was invalid. Respondent before that Court was asserting that the District Court was wrong in holding that its franchise was invalid because it had not been submitted to a popular vote, and three decisions of the Missouri Supreme Court holding that no such ratification was necessary were called to the attention of the Court of Appeals. They are *State ex inf. Chaney* v. *West Missouri Power Company*, 313 Mo. 283, 281 S. W. 2d 709; *Holland Realty Power Co.* v. *City of St. Louis*, 282 Mo. 180, 221 S. W. 51; *State ex inf.* v. *Light & Power Co.*, 246 Mo. 653, l. c. 666, 152 S. W. 76. So that it is apparent that the Court of Appeals did not intend to adopt the ruling of the District Court that the franchise was invalid. The opinion proceeds to hold (resort may be made to the opinion for the holding, *National Foundry & Pipe Works, Ltd.*, v. *Oconto City Water Supply Co.*, 183 U. S. 216) that the failure to advertise according to the Missouri Statute was an irregularity only which did not affect the validity of the contract for the erection of the plant (The District Court had held that such failure rendered the contracts invalid). The opinion also held that the plaintiff was guilty of laches (The District Court had so indicated but had not so declared). Then the Court of Appeals said: "We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed." The relator herein seeks to construe this final statement of the Court of Appeals as meaning that it was right for the reasons set up in the District Court's opinion. Obviously this is incorrect, and the reference of the Court of Appeals is to its own reasons. This is so because: first, the Court of Appeals reversed the District Court on the ques-

tion of the right of the plaintiff to maintain the action. The District Court said that because we had no franchise we could not maintain the action. The Court of Appeals said that regardless of the franchise the plaintiff could maintain the suit, so the Court of Appeals reversed the District Court on this point; next, the District Court held that the failure to properly advertise for bids rendered the contracts for the construction of the plant and the purchase of materials invalid, but the Court of Appeals said that these were irregularities which would not affect the validity of the contract; finally, the District Court did not place its dismissal on the ground of laches, while the Court of Appeals expressly places its dismissal thereon. So no other conclusions can be drawn than that the Court of Appeals sustain the order of dismissal for reasons other than the one advanced by the District Court. The affirmance of the order by the Court of Appeals was a conditional affirmance.

The rule is well established in the 8th Circuit that an appeal in equity brings before the Appellate Court the whole record, and the Court is required to examine the case and decide the case *de novo*. (*Aro Equipment Corp.* v. *Herring-Wissler, supra*) and as said by Judge Sanborn in *Union Central Life Ins. Co.* v. *Imsland*, 91 F. 2d 365: "An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence." Such is the rule in this Court (*Dodge* v. *Knowles*, 114 U. S. 430); and as this Court said in *Kendall* v. *Ewert*, 259 U. S. 139, in discussing an appeal from an equity case: "It therefore is a final decree, the appeal from which brings, not only the validity of the stipulation for dismissal, but the entire cause, here for such disposition as the justice of the case may require." We therefore assert that the appeal from the decision of the District Court

and the disposition of it by the Circuit Court of Appeals left no part of the decree of the District Court in effect. The judgment of the Court of Appeals affirmed the action of dismissal but on entirely different grounds, so that there is no basis to claim that the opinion of the Distrct Court is *res judicata*.

This situation is covered in the *Restatement of the Law* in the volume entitled "Judgments," Section 69, page 316, wherein, discussing the affirmance of a judgment based upon alternative grounds, it is said:

> "b. *Affirmance of a judgment which was based on alternative grounds.* If the judgment of the court of first instance was based upon two alternative grounds, either of which would be sufficient to support the judgment, and the appellate court holds that both of these grounds are sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both grounds in a subsequent action on a different cause of action (See Par. 68, Comment n.).
>
> "If the appellate court determines that one of these grounds is sufficient but that the other is not, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.
>
> "If the appellate court determines that one of these grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground."

The leading case on the subject of estoppel by judgment is that of *Cromwell* v. *County of Sac*, 94 U. S. 351. In that case suit was brought upon coupons attached to bonds issued by a county by a holder before maturity. The county set up a prior judgment holding that the bonds and coupons were invalid in the hands of one not

a holder for value before maturity. This Court held that the case was different and the first judgment was not a bar, and the Court said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel is another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

From this decision and many others which are cited in our summary, it must be held that the judgment in the Federal Court case which, as stated, was an action to enjoin the construction of the municipal plant, being

upon a different cause of action from the cause of action set up in the instant ouster case, could not be *res judicata;* and that all that could be claimed is that the judgment in such action operates as an estoppel only as to the points actually determined in the prior action.

Now not only did the Circuit Court of Appeals set aside the judgment and finding of the District Judge with respect to the franchise, but it directly held that whether there was a franchise or not was not a material issue, so that it cannot be claimed that the validity of the franchise was in issue in said action.

The Supreme Court of Missouri, in deciding that the District Court's opinion was not *res judicata*, relied upon the decision in *Cromwell* v. *County of Sac*, *supra*, as well as its own decisions, and the opinion of the Missouri Court clearly outlines the facts and correctly states the law. Further, Section 1 of Article IV of the Constitution provides that credit shall be given to the judicial proceedings, not to a part of the judicial proceedings. The judicial proceedings in the Federal Court action included the decision and opinion of the Circuit Court of Appeals.

The petitioner claims that the Missouri Supreme Court in sustaining the validity of respondent's franchise has violated the contract clause and the due process clause of the Constitution. It is difficult to follow the relator's position. In the first place, the City of Trenton is shown to be a municipal corporation of the State of Missouri, and as such it is entirely subject to the control of the legislative and judicial branches of the state government. Relator does not point out any specific constitutional provision of the State of Missouri or statute of the State that gives the city any vested right. It has long been the established policy of the State of Missouri that exclusive franchises may not be granted but that perpetual fran-

chises may be (see *State ex inf. Chaney* v. *West Mo. Power Co., supra*) and there is no constitutional provision prohibiting perpetual franchises in Missouri. Statutes limiting franchises as to term do not exist with respect to all cities, and did not exist as to any cities before 1893.

With respect to the contract clause of the Constitution, it is to be noted that the Constitution expressly provides that no state may pass any law impairing the obligation of a contract. This constitutional provision does not apply to judicial action. It has been so expressly held. In *McCoy* v. *Union Elevated R. Co.*, 247 U. S. 354, many decisions are cited in support of the holding therein that the contract clause prohibits legislative, not judicial, action (See also *Columbia Ry., Gas & Elec. Co.* v. *State of So. Carolina*, 261 U. S. 236).

With respect to the claim that the due process clause has been violated, the same rule is applicable. In *Risty* v. *C. R. I. & P. Ry. Co.*, 270 U. S. 378, Mr. Justice Stone said: "The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the 14th Amendment." And in *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, Mr. Justice Butler said: "In none of these cases was any political subdivision held to be protected by the contract clause or the 14th Amendment. This Court has never held that these subdivisions may invoke such restraint upon the power of the State." And citing *East Hartford* v. *Hartford Bridge Company*, the opinion further says: "The reasons given in the opinion (10 How. 533) support the contention of the State here made that the city cannot possess a contract with the state which may not be changed or regulated by state legislation." Other cases which we have hereinabove cited also support this position.

The petitioner does not cite a single constitutional provision of Missouri or statute which gives it any exclusive right to operate in the City of Trenton. There are none such, so the City of Trenton is not in any position where any right which it has is impaired. Absent the right to be free of competition, it is not in a position to claim, if it could otherwise claim, that the action of the Supreme Court in sustaining the Jones franchise deprived it of any right.

The question is covered by the decision of this Court in *Tenn. Elec. Power Co.* v. *Tenn. Valley A.*, 306 U. S. 118, wherein, discussing a like claim, this Court said:

> "The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field. The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise."

The principle is analogous because unless the City of Trenton does have a right to be free from competition it is not in a position to claim that any right has been taken from it under the ruling in the T. V. A. case.

The power of a municipal corporation in Missouri was well defined in the case of *State ex rel.* v. *S. L., K. C. & N. Ry. Co.*, 9 Mo. App. 532, wherein the Court, discussing the powers of such corporations, said:

> "Such bodies are creatures of the legislature to such an extent that they hold those franchises which are of a public nature entirely subject to legislative control. Unlike a private corporation, no vested right in the nature of the contract exists in those franchises, and it is competent to the legislature to modify them at pleasure, or to take them wholly away."

This opinion was affirmed in its entirety by the Supreme Court in 79 Mo. 420, and many subsequent cases affirm the doctrine.

The right of the City of Trenton to engage in the electric power business is entirely subject to legislative control. The right of the respondent herein springs from the statutes of Missouri and the charter of the City of Trenton granted by the State. The construction of these statutes by the Missouri courts will, under many decisions of this Court (of which *Madden* v. *Com. of Ky., supra,* and *Illinois Central R. Co.* v. *State of Minnesota, supra,* are typical) be followed by this Court, and a consideration of the authorities cited therein will show that the Court has followed the established law of the State as outlined by many decisions in the conclusion it reached.

This proceeding is not one for a review of errors which the petition seeks to make it. It complains of the failure of the Missouri Supreme Court to properly apply the law of this State which contention, we think, is not reviewable by this Court.

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, holds that the courts of the United States must follow the decisions of the State courts in actions at common law. The decision assailed was one in quo warranto and is an action at common law, and this Court under that case will follow the decisions of the Missouri court.

As we understand the relator's claim, it is that a strict construction of the Jones franchise would have resulted in a holding that the electric portion of the franchise had been abandoned. To review that question is not the function of this Court in this proceeding, but if it were, then the Court would find that many controlling decisions of the Missouri Supreme Court sustain the right of the city to grant a franchise under its charter, and sustain the conclusion of the Court that there was no forfeiture of the electric franchise.

It should be pointed out that, as shown in the opinion of the Missouri Supreme Court, the franchise for both gas and electric plants was granted in 1886, that the only condition of the franchise ordinance was that either gas or electric light works should be completed in 1886, and that in fact the gas plant was constructed that year; that there was no self-enforcing forfeiture clause in the franchise, and that the holders of the franchise in 1897 began to supply the city with electric power under the franchise, and that repeatedly thereafter the city expressly recognized the existence of the Jones electric franchise, and the record is replete with showings that from 1897 until 1938 the city dealt with the holders of the franchise in such a way as to recognize the existence of the electric franchise and to estop it from denying that it was valid and in force, and that for a period of more than forty years the respondent and its predecessors have operated the electric plant in Trenton without their right being questioned, and have during that time built and enlarged the property from a small electric plant to one wherein they have an investment of nearly one-half million dollars in the electric property at Trenton, which the City of Trenton now desires to destroy because it is itself in the electric power business.

We respectfully submit to the Court that the petition filed herein does not make any case for the intervention of this Court, and we pray that the petition be denied.

A. Z. PATTERSON,
DEWITT C. CHASTAIN,
Attorneys for Respondent.